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Supreme Court, U. S.  
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No. 120, Original

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1997

STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF NEW YORK,

*Defendant.*

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

**RESPONSE OF PROPOSED NEW YORK  
LANDMARKS AMICI TO OBJECTIONS  
OF THE STATE OF NEW JERSEY TO  
MOTION FOR LEAVE TO FILE  
BRIEF AS AMICI CURIAE**

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No. 120, Original

IN THE

**SUPREME COURT OF THE UNITED STATES**

STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF NEW YORK,

*Defendant.*

**RESPONSE OF PROPOSED NEW YORK LANDMARKS  
AMICI TO THE OBJECTIONS OF THE STATE OF NEW  
JERSEY TO MOTION FOR LEAVE TO FILE  
BRIEF AS *AMICI CURIAE***

The New York Landmarks Conservancy, the Preservation League of New York State, and the Historic Districts Council (collectively, "Proposed New York Landmarks Amici" or "Proposed Amici") respectfully respond to the Objections of the State of New Jersey to their Motion for leave to file a brief as *amici curiae* (the "Landmarks Brief") in support of the State of New York's Exceptions to the reports filed by the Special Master in this case on March 31 and May 30, 1997 (together, the "Report" or "R."). Proposed Amici seek to file the Landmarks Brief to proffer to the Court their expertise with respect to New York history and landmarks so as to aid the Court in addressing several of the novel issues raised by this original case. New Jersey opposes the filing of the Brief on the grounds that (1) the Special Master's interpretation of Article III, which Proposed Amici challenge, is "not before the Court" and (2) the Landmarks Brief addresses issues that are "irrelevant to the issues to be decided in this matter." (Objections at 6, 8.) New Jersey is wrong on both counts.

### ARTICLE III IS BEFORE THE COURT

New Jersey's contention that Article III is not properly before this Court is utterly at odds with the record in this case. The Special Master's analysis and conclusions concerning Article III fill more than a dozen pages of the Report. (R. at 44-45, 56-60, 63-68, 77-80.) New York has expressly made its Article II arguments turn on a construction of Article III that differs significantly from that of the Special Master. (NY Br., Question Presented 1 (premising Article II argument on assumption that a "central purpose of the Compact was to confirm New York's control of commerce and navigation in New York Harbor.")) And New Jersey itself has taken great pains to embrace the Special Master's interpretation of Article III as vesting only limited jurisdiction in New York on the New Jersey side of the Article I boundary. (NJ Br. at 8-9.) Under such circumstances, it is difficult to understand how this Court can—to the extent that it does not find for New York on any other ground—avoid addressing the propriety of the Report's Article III conclusions.

Even if this were not the case, however, Proposed Amici would still not be precluded from making arguments based on Article III. Under Supreme Court Rule 37.1, which provides that an amicus brief should "bring relevant matter to the attention of the Court that has not already been brought to its attention by the parties," the scope of an amicus brief is not limited to the facts relied upon or the arguments made by the party in whose support the brief is filed. To the contrary, the Court has many times "rel[ied] on factual information, cases or analytical approaches provided only by an amicus." Robert L. Stern, *et al.*, *Supreme Court Practice* 564 (1993); *see, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987) (relying on amicus brief for information regarding Muslim religious practices); *Turner v. Safley*, 482 U.S. 78, 93, 95

(1987) (citing amicus brief in support of argument for prison mail regulation), *Maryland v. Craig*, 497 U.S. 836, 855-58 (1990) (relying on amicus brief for information concerning child abuse), *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 589 n.3 (1986) (dissent) (relying on amicus brief for facts concerning liquor industry pricing); *Elgin, J. & E. Ry. Co. v. Burley*, 327 U.S. 661, 669-75 (1946) (dissent) (citing arguments made by *amici curiae* concerning Railway Labor Act).

There is even greater reason to apply this liberal standard in a case over which the Court has original jurisdiction, like the present one, involving construction of an interstate compact. In an original jurisdiction case, unlike in a circuit court appeal or an appeal on *certiorari* to this Court, *all* of the findings and conclusions of the Special Master remain subject to *de novo* review, see *United States v. Maine*, 475 U.S. 89, 97-98 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984), so there can be no basis for a finding of appellate waiver. When the Court conducts (as it must) its own review of all the Report's conclusions, there should be no reason to exclude from consideration any amicus brief that would offer the Court "considerable help" with respect to any of these conclusions. Sup. Ct. Rule 37.1.

Adopting such a standard in this case is further warranted by the fact that the Compact of 1834 must, as even New Jersey concedes, "be interpreted as a whole so that all of its parts are harmonized" (NJ Br. at 31, citing *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 509 (1986).) Thorough consideration and understanding of the relationship among all of the various components of the Compact is necessary in order to settle on an appropriate approach to disposition. The Court should no more focus on certain Articles and exclude others than it should exclude from consideration related provisions in any case involving statutory construction. In this



context, an amicus brief, like the Landmarks Brief, which focuses on an Article not extensively evaluated by the parties, should prove of substantial assistance to the Court.

#### **PROPOSED AMICI'S ARGUMENTS ARE RELEVANT**

New Jersey's claim that the Landmarks Brief addresses issues that are "irrelevant" to the disposition of this case is equally unfounded. To the extent that the Court deems it necessary to reach Article III, coming to terms with the issues explored in the Landmarks Brief is essential to full resolution of the boundary dispute between New York and New Jersey. Indeed, as a matter of compact construction, that dispute turns entirely on the Compact's use of two terms—"property" and "jurisdiction." And it is to an analysis of contemporaneous understandings of these very terms to which the Landmarks Brief is chiefly dedicated.

Point I of the Landmarks Brief addresses a major flaw in the Report's analysis of the "exclusive right of property" granted to New Jersey by Article III. The Report equates this right of "property" in "underwater lands" with "sovereignty" over those underwater lands. However, the Report reaches this conclusion without taking into account abundant contemporaneous evidence that the Commissioners who drafted the Compact (1) understood that a State could have either "proprietary" or "sovereign" property rights in "underwater lands" and (2) used language in the Compact that demonstrates that all they intended to grant to New Jersey in the underwater lands surrounding Ellis Island was a "proprietary" right of property. The merits of Proposed Amici's argument as to this issue are for the Court to decide, but New Jersey cannot credibly contend that this argument is "irrelevant" to disposition of this case.

Point II of the Brief targets an even more significant gap in the Report's conclusions. The Report concludes simply and bluntly that New Jersey has "sovereignty" over

Ellis Island and the western half of the Hudson River. At the same time, however, the Report acknowledges that Article III permits New York to retain some measure of residual jurisdiction on the New Jersey side of the Article I boundary. The Special Master several times alludes to this jurisdiction as "limited," "legal," and, most significantly, as "police" jurisdiction, but the Report makes no effort to further circumscribe its scope, or determine its relationship to New Jersey's purportedly "sovereign" powers, over the underwater lands in the vicinity of Ellis Island.

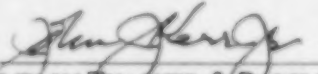
The Report's failure to address this issue is of particular significance to the Proposed Amici because what the Report acknowledges to be New York's "police jurisdiction" on the New Jersey side of the Article I boundary line is, in Proposed Amici's view, enough to give New York jurisdiction over, *inter alia*, "historic preservation" matters on the New Jersey side of the boundary. The merits of this argument are, once again, for the Court to decide, but the fact remains that resolution of this question is both relevant to this case and essential to full adjudication of the New York-New Jersey boundary dispute. Indeed, the very fact that New Jersey now feels compelled to take issue with Proposed Amici's view of the scope of New York's residual jurisdiction demonstrates that (a) this issue has not been definitively addressed by the Report and (b) there remains room for disagreement as to its proper resolution. Under such circumstances, it is difficult to understand how it can be claimed that the Report facilitates a full resolution of the dispute when an issue of such potential significance remains unresolved. The Landmarks Brief undertakes to fill this gap in the Report's conclusions and urges the Court to do the same.



WHEREFORE, the Proposed New York Landmarks Amici respectfully request that New Jersey's Objections be overruled and their motion for leave to file the Landmarks Brief as *amici curiae* be granted in its entirety.

Dated: New York, New York  
August 20, 1997

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## CERTIFICATE OF SERVICE

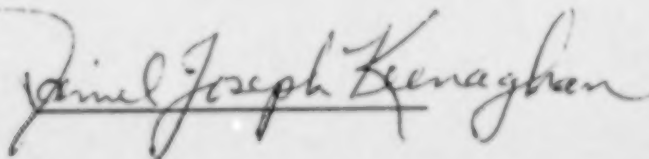
I hereby certify that the annexed Response of *Amici Curiae* New York Landmarks Conservancy, Preservation League of New York State, and Historic Districts Council to Objections of The State of New Jersey to Motion for Leave to File Brief as *Amici Curiae* was served via U.S. Mail on August 20, 1997, upon the following counsel of record:

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A handwritten signature in cursive script, reading "Daniel Joseph Kenaghan". The signature is written in dark ink and is positioned at the bottom right of the page.